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VIA ELECTRONIC MAIL

Barry Breen, Office Director
Office of Site Remediation Enforcement
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mailcode 2272A
Washington, DC 20460

Re: Superfund Recycling Equity Act Stakeholders Meeting - Association of Battery Recycler's Written Comments

Dear Mr. Breen:

On behalf of the Association of Battery Recyclers, Inc. ("ABR"), a national trade association that represents the lead recycling industry, we hereby submit the following comments regarding the need for EPA guidance on prospective recycling transactions covered by the Superfund Recycling Equity Act ("SREA"). These comments are timely submitted in response to the Federal Register notice published on June 14, 2000. See, 65 *Fed. Reg*. 37370.

ABR's membership is comprised primarily of secondary lead smelters ("consuming facilities"), whose members also transport materials off-site for reclamation, and users of lead who supply lead-bearing materials ("suppliers") to smelters. We believe incorporating ABR's suggestions into the agency's analysis will ensure that EPA establishes equitable standards for applying the SREA.

ABR's comments address the following six issues: 1) the need for EPA guidance; 2) what are prevailing industrial practices for determining a consuming facility's environmental compliance status; 3) the definition of recyclable materials; 4) the quantity and quality of publicly available environmental compliance information; 5) how suppliers of recyclable material should exercise "reasonable care" under § 127(c)(5) and § 127(c)(6) when determining the compliance status of a

consuming facility; and 6) whether a supplier of recyclable material can rely on a consuming facility's self-certification to satisfy the "reasonable care" standard.

As discussed herein, these comments are based on the viewpoint that any interpretation or application of the SREA should not increase the potential liability of non-exempted parties nor threaten the successes being achieved by the lead recycling industry in reclaiming spent lead acid batteries. In the event that EPA is unwilling to embrace this viewpoint, the criteria that must be satisfied to obtain the SREA exemption should be expansive and comprehensive and the definition of recyclable materials necessarily must be limited. The ABR reserves its right to amend these comments to respond to any position advocated by EPA that places its members or the battery recycling chain at risk.

1. Need for EPA Guidance

ABR believes it is important for EPA to issue guidance dealing with prospective recycling transactions covered by the SREA. Any EPA guidance should clearly state that it applies only to prospective transactions and that any issues regarding recycling transactions which occurred prior to enactment of the SREA must be determined by the courts.

ABR is particularly concerned that without guidance from EPA, the SREA could result in unfairly increasing the liability of consuming facilities. The SREA is silent about what parties should bear the costs that otherwise would be imposed on suppliers of recyclable material. Under CERCLA's joint and several liability structure, the potential liability of the consuming facilities (and other non-exempt parties) at future site cleanups could increase to absorb the SREA exempted share. EPA itself has estimated that the exemption could cost non-exempt parties at Superfund sites from $156 million to $175 million.[1] ABR believes this result would undermine the intent of the statute, which is intended "to create greater equity in the statutory treatment of recycled versus virgin materials."[2] Congressman Oxley's statement to the Congressional Record supports ABR's position. Congressman Oxley, referring to §127(g) of the SREA, stated:

> [t]his provision clearly provides that at a Superfund site where some parties are exempted from liability under §127, the remaining non-exempt owner/operators at the site should not face increased liability as a result of the enactment of §127. Congressional Record at E2535 (Dec. 3, 1999).

Therefore, EPA should issue guidance that allows the agency to designate that portion of liability allocated to exempt suppliers of recyclable material as an "orphan share" and assign this portion to the Superfund. In analogous situations, EPA has opted to provide orphan share

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[1] Bureau of National Affairs, *Regulation, Law & Economics* at A-34 (Dec. 8, 1999).

[2] Superfund Recycling Equity Act, § 9627 (a)(3) (1999).

funding for the costs allocated to insolvent or defunct PRPs.[3] Without this guidance, Congress' attempt to encourage recycling and remove the threat of CERCLA liability for recycling transactions could actually result in increased liability for consuming facilities and other non-exempt parties that have been engaged in legitimate recycling activities.

Another issue of concern for ABR is how the SREA will be applied to transactions involving spent lead acid batteries, as outlined in § 127(e). For example, it is common in the recycling industry for a battery manufacturer to execute a tolling agreement with a consuming facility whereby the battery manufacturer sends spent batteries to the consuming facility for reclamation, and the consuming facility returns finished lead to the battery manufacturer. In the tolling agreement situation described herein, EPA should confirm that a battery manufacturer which receives finished lead from a consuming facility is not recovering "the valuable components of such batteries" as prohibited by § 127(e)(1) in order to allow the battery manufacturer to avail itself of the exemption. ABR believes that SREA should apply to battery manufacturers that use tolling agreements with consuming facilities; any other interpretation would defeat the purpose of the SREA and discourage recycling within the industry. Senator Lott's statement to the Congressional Record on November 19, 1999 supports this position, as does the legislative history of an earlier version of the bill that contained virtually identical language regarding the same issue.[4] Senator Lott states

> The act of recovering the valuable components of a battery refers to the breaking (or smelting) of the battery itself in order to reclaim the valuable components of such battery. The generation, transportation, and collection of such batteries by persons who arrange for their recycling is an activity distinct from recovery. Thus, a person who generates, transports, and/or collects a spent battery, but does not themselves break or smelt such battery, is not liable under §§ 107 (a)(3) and (4) provided all other requirements set out in this Section are met. Congressional Record at S15050 (Nov. 19, 1999).

2. Prevailing Industry Practices

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[3] Under the *Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time Critical Assurance* (June 3, 1996) ("Interim Guidance on Orphan Share Compensation"), EPA has stated its willingness to provide orphan share compensation in settlements at sites where there is an equitable share attributable to PRPs who are insolvent or defunct.

[4] Although Senator Lott's statement is entitled "Legislative History For S. 1528," ABR points EPA to Senator Daschle's January 26, 2000 statement in the Congressional Record that the SREA was passed as an appropriations rider without the benefit of hearings, debates, or substantive committee consideration during the 106th Congress. This paragraph of Senator Lott's statement is almost verbatim with the language found in the House Report on the Superfund Reform Act of 1994 (103d Congress) at 126.

Although practices vary from company to company, it is generally considered good, sound practice in the recycling industry to conduct an inquiry into any facility that will be receiving material for recycling. The inquiry can include contacting the relevant facility to determine if it has all the necessary environmental permits and an appropriate level of insurance coverage, speaking with officials at the relevant state and federal agencies regarding whether the facility has any outstanding compliance issues (i.e., Notice of Violation, Orders), and conducting site visits in those instances discussed herein.

3. Definition of Recyclable Materials

ABR requests that EPA clarify the specific exclusion in § 127(f) designed to prevent "sham recycling." In relevant part, § 127(f) states that the recycling exemption shall not apply if the person arranging for the recycling had an "objectively reasonable basis to believe at the time of the recycling transaction...that the recyclable material would be burned as fuel, or for energy recovery or incineration." However, pursuant to regulations enacting RCRA, 40 C.F.R. 266.100 (c)(3), smelters processing materials listed in Part 266 Appendix XI that 1) contain recoverable levels of lead, 2) contain less than 500 ppm of 40 C.F.R. Part 261 Appendix VIII organic constituents, 3) do not exhibit the Toxicity Characteristic for an organic constituent, and 4) are not listed hazardous wastes because of an organic constituent, are not considered to be burned for energy recovery, and are exempt from Boiler and Industrial Furnace ("BIF") regulations promulgated under RCRA. This exemption applies regardless of whether the materials have a heating value greater than 5000 Btu/lb. In fact, EPA recognized that materials with greater than 5000 Btu/lb could legitimately be processed solely for metal recovery, stating "[w]e do not believe that such materials are burned either for sham recycling of for conventional treatment."[5]

Because EPA has acknowledged that materials listed in Appendix 11 are legitimately processed for metal recovery, ABR requests that EPA clarify that all materials contained in Appendix 11 of the BIF rule should also be considered per se "recyclable materials" under the SREA, and should not be subject to the exclusion in §127(f). Furthermore, because there are other materials not listed in Appendix 11 that are legitimately reclaimed, EPA should explicitly state that Appendix 11 is not the exclusive list of recyclable materials under the SREA as the statute applies to the lead industry.

4. Publicly Available Environmental Compliance Information

ABR is satisfied with the quantity and quality of information available on EPA's Internet website, but believes a follow-up call with the appropriate regulatory agency should be necessary to ensure that the party seeking the exemption is given an up-to-date and more comprehensive history of the consuming facility's current compliance record. However, if EPA decides that internet research alone is an appropriate means of inquiry to determine a consuming facility's

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[5] *See* 56 Fed. Reg. 42504, 42507 (Aug. 27, 1991).

compliance status, ABR requests that EPA provide assurances that its public databases will be frequently updated to demonstrate, where warranted, that past violations have been corrected.

5. "Reasonable Care" Under § 127 (c)(5) and § 127 (c)(6)

ABR encourages EPA to provide guidelines for implementing the "reasonable care" criteria listed in § 127 (c)(5), (6). ABR's concerns are discussed in detail below.

a. **Inquiries To Appropriate Federal, State or Local Environmental Agencies**

ABR believes any party seeking the exemption should be required to contact the relevant federal, state and local environmental agencies to determine the compliance status of the consuming facility the first time a supplier uses a consuming facility, and on an annual basis thereafter. This investigation should be followed by an inquiry to the consuming facility to clarify any conflicting or troubling information received from agencies. In order to claim the exemption at a future time, the supplier should be required to document its inquiries contemporaneously and keep all documentation on file at its facility.

ABR is concerned that a situation may arise where a consuming facility which is currently in environmental compliance and has sound environmental practices, but may have had infractions in the past, could be adversely impacted if suppliers cease sending materials to the facility as a result of the SREA. ABR suggests that in those rare circumstances where a supplier is concerned about the information uncovered, or has received conflicting information regarding a consuming facility's compliance history, the supplier should conduct a site visit. Any guidance from EPA should include a clear affirmation that sending recyclable materials to a consuming facility with a past violation is not enough, by itself, to prevent a claimant from asserting the SREA exemption.

b. **Price Paid for the Recycling Transaction**

ABR agrees that consideration of whether market price is paid for materials can be a helpful tool in determining whether legitimate recycling is occurring. However, it should be noted that sometimes legitimate, long term recycling contracts have established prices that may not always reflect current market rates. Moreover, in certain circumstances, suppliers have to pay a fee to smelters to process lead bearing materials. Hence, payment of a market price should not be the determinative factor in assessing the applicability of the SREA exemption.

c. **Site Visits**

ABR believes site visits can be a useful tool in certain limited circumstances. Specifically, a site visit may be necessary if a supplier obtains conflicting information regarding the compliance status of a consuming facility. Further, if a supplier is using a consuming facility for the first time,

it may be appropriate to conduct a site visit. In order to protect trade secrets, however, consuming facilities may require suppliers to enter into confidentiality agreements before touring the facility. Such confidentiality agreements should be recognized as being consistent with the purposes of the SREA.

6. Facility Self-Certification

ABR encourages all suppliers to communicate periodically with the consuming facilities they deal with, to make appropriate inquiries into the consuming facility's compliance status, and obtain a certification of compliance on an annual basis. However, it is not sufficient for a supplier to rely solely on a self-certification from a consuming facility to meet the reasonable care standard of § 127(c)(5), (6).

ABR does not object to annual self-certification by consuming facilities, as long as it is coupled with additional inquiries to the relevant administrative agencies or to EPA's publically available databases. Suppliers of recyclable materials should be required to request certification from the consuming facilities on an annual basis. Given that consuming facilities each have hundreds of customers, requiring them to answer lengthy questionnaires would be burdensome. Thus, a brief certification, coupled with other inquiries described herein, would adequately meet the requirements of the SREA.

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We welcome the opportunity to work with EPA throughout the development of guidance on the SREA. Please do not hesitate to contact use if you have any questions.

Sincerely,

Robert N. Steinwurtzel
Susan D. Loyd

cc: ABR Board of Directors